

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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ANTHONY VINCENT ABEYTA,

Petitioner,

v.

ROBERT LEGRAND, et al.,

Respondents.

Case No. 3:12-cv-00251-MMD-VPC

ORDER

This *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by state prisoner Anthony Vincent Abeyta is before the Court for final disposition on the merits (dkt. no. 8). Respondents have answered the petition (dkt. no. 24), and Abeyta replied (dkt. no. 27).

**I. PROCEDURAL HISTORY AND BACKGROUND**

On February 3, 2010, Abeyta pleaded guilty to one count of attempted murder with the use of a deadly weapon (exhibits to respondents' motion to dismiss, dkt. no. 14, exh. 36).<sup>1</sup> The state district court sentenced him to two consecutive terms of five to twenty years. *Id.* The Nevada Supreme Court affirmed his convictions on November 5, 2010. (Exh. 53.)

On June 16, 2011, Abeyta filed a proper person postconviction petition for a writ of habeas corpus in state district court. (Exh. 63.) Following an evidentiary hearing, the state district court denied the petition. (Exhs. 74, 83.) The Nevada Supreme

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<sup>1</sup>The exhibits referenced in this order are exhibits to respondents' motion to dismiss (dkt. no. 14) and are found at dkt. nos. 15-18.

1 Court affirmed the denial of the petition on April 11, 2012, and remittitur issued on May  
2 8, 2012. (Exhs. 98, 100.)

3 Abeyta dispatched this federal petition for writ of habeas corpus on May 7, 2012  
4 (dkt. no. 8). Respondents have answered the remaining grounds (dkt. no. 24).

## 5 **II. LEGAL STANDARDS**

### 6 **A. Antiterrorism and Effective Death Penalty Act (AEDPA)**

7 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty  
8 Act (AEDPA), provides the legal standards for this court's consideration of the petition in  
9 this case:

10 An application for a writ of habeas corpus on behalf of a person in  
11 custody pursuant to the judgment of a State court shall not be granted with  
12 respect to any claim that was adjudicated on the merits in State court  
13 proceedings unless the adjudication of the claim —

14 (1) resulted in a decision that was contrary to, or involved an  
15 unreasonable application of, clearly established Federal law, as  
16 determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable  
determination of the facts in light of the evidence presented in the State  
court proceeding.

17 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner  
18 applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court  
19 convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S.  
20 685, 693-694 (2002). This Court’s ability to grant a writ is limited to cases where “there  
21 is no possibility fair-minded jurists could disagree that the state court’s decision conflicts  
22 with [Supreme Court] precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The  
23 Supreme Court has emphasized “that even a strong case for relief does not mean the  
24 state court’s contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538  
25 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing  
26 the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating  
27 state-court rulings, which demands that state-court decisions be given the benefit of the  
28 doubt”) (internal quotation marks and citations omitted).

1 A state court decision is contrary to clearly established Supreme Court  
2 precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that  
3 contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state  
4 court confronts a set of facts that are materially indistinguishable from a decision of [the  
5 Supreme Court] and nevertheless arrives at a result different from [the Supreme  
6 Court’s] precedent.” *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362,  
7 405-06 (2000), and citing *Bell*, 535 U.S. at 694.

8 A state court decision is an unreasonable application of clearly established  
9 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court  
10 identifies the correct governing legal principle from [the Supreme Court’s] decisions but  
11 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538  
12 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause  
13 requires the state court decision to be more than incorrect or erroneous; the state  
14 court’s application of clearly established law must be objectively unreasonable. *Id.*  
15 (quoting *Williams*, 529 U.S. at 409).

16 To the extent that the state court’s factual findings are challenged, the  
17 “unreasonable determination of fact” clause of § 2254(d)(2) controls on federal habeas  
18 review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause  
19 requires that the federal courts “must be particularly deferential” to state court factual  
20 determinations. *Id.* The governing standard is not satisfied by a showing merely that the  
21 state court finding was “clearly erroneous.” 393 F.3d at 973. Rather, AEDPA requires  
22 substantially more deference:

23 .... [I]n concluding that a state-court finding is unsupported by  
24 substantial evidence in the state-court record, it is not enough that we  
25 would reverse in similar circumstances if this were an appeal from a  
26 district court decision. Rather, we must be convinced that an appellate  
panel, applying the normal standards of appellate review, could not  
reasonably conclude that the finding is supported by the record.

27 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.2004); *see also Lambert*, 393  
28 F.3d at 972.

1 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be  
2 correct unless rebutted by clear and convincing evidence. The petitioner bears the  
3 burden of proving by a preponderance of the evidence that he is entitled to habeas  
4 relief. *Cullen*, 563 U.S. at 181.

5 **B. Ineffective Assistance of Counsel**

6 Ineffective assistance of counsel claims are governed by the two-part test  
7 announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the  
8 Supreme Court held that a petitioner claiming ineffective assistance of counsel has the  
9 burden of demonstrating that (1) the attorney made errors so serious that he or she was  
10 not functioning as the “counsel” guaranteed by the Sixth Amendment, and (2) that the  
11 deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing  
12 *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that  
13 counsel’s representation fell below an objective standard of reasonableness. *Id.* To  
14 establish prejudice, the defendant must show that there is a reasonable probability that,  
15 but for counsel’s unprofessional errors, the result of the proceeding would have been  
16 different. *Id.* A reasonable probability is “probability sufficient to undermine confidence in  
17 the outcome.” *Id.* Additionally, any review of the attorney’s performance must be “highly  
18 deferential” and must adopt counsel’s perspective at the time of the challenged conduct,  
19 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the  
20 petitioner’s burden to overcome the presumption that counsel’s actions might be  
21 considered sound trial strategy. *Id.*

22 Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
23 performance of counsel resulting in prejudice, “with performance being measured  
24 against an objective standard of reasonableness, . . . under prevailing professional  
25 norms.” *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations  
26 omitted). When the ineffective assistance of counsel claim is based on a challenge to a  
27 guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate “that  
28 there is a reasonable probability that, but for counsel’s errors, he would not have

1 pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52,  
2 59 (1985).

3 If the state court has already rejected an ineffective assistance claim, a federal  
4 habeas court may only grant relief if that decision was contrary to, or an unreasonable  
5 application of, the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).  
6 There is a strong presumption that counsel’s conduct falls within the wide range of  
7 reasonable professional assistance. *Id.*

8 The United States Supreme Court has described federal review of a state  
9 supreme court’s decision on a claim of ineffective assistance of counsel as “doubly  
10 deferential.” *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411,  
11 1413 (2009)). The Supreme Court emphasized that: “We take a ‘highly deferential’ look  
12 at counsel’s performance . . . through the ‘deferential lens of § 2254(d).” *Id.* at 1403  
13 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance  
14 of counsel claim is limited to the record before the state court that adjudicated the claim  
15 on the merits. *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has  
16 specifically reaffirmed the extensive deference owed to a state court’s decision  
17 regarding claims of ineffective assistance of counsel:

18 Establishing that a state court’s application of *Strickland* was  
19 unreasonable under § 2254(d) is all the more difficult. The standards  
20 created by *Strickland* and § 2254(d) are both “highly deferential,” *id.* at  
21 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.  
22 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review  
23 is “doubly” so, *Knowles*, 556 U.S. at —, 129 S.Ct. at 1420. The  
24 *Strickland* standard is a general one, so the range of reasonable  
applications is substantial. 556 U.S. at —, 129 S.Ct. at 1420. Federal  
habeas courts must guard against the danger of equating  
unreasonableness under *Strickland* with unreasonableness under §  
2254(d). When § 2254(d) applies, the question is whether there is any  
reasonable argument that counsel satisfied *Strickland’s* deferential  
standard.

25 *Harrington*, 562 U.S. at 105. “A court considering a claim of ineffective assistance  
26 of counsel must apply a ‘strong presumption’ that counsel’s representation was within  
27 the ‘wide range’ of reasonable professional assistance.” *Id.* at 104 (quoting *Strickland*,  
28 466 U.S. at 689). “The question is whether an attorney’s representation amounted to

1 incompetence under prevailing professional norms, not whether it deviated from best  
2 practices or most common custom.” *Id.* (internal quotations and citations omitted).

3 Abeyta pleaded guilty upon the advice of counsel, thus he “may only attack the  
4 voluntary and intelligent character of the guilty plea by showing that the advice he  
5 received from counsel was [ineffective] . . . and that there is a reasonable probability  
6 that, but for counsel’s errors, he would not have pleaded guilty and would have insisted  
7 on going to trial.” *Hill*, 474 U.S. at 56-57, 59; *Lambert*, 393 F.3d at 980-981.

### 8 **III. REMAINING GROUNDS IN THE PETITION**

9 With the exception of ground 10 — set forth below — Abeyta’s remaining  
10 grounds are all claims of ineffective assistance of counsel in violation of his Sixth and  
11 Fourteenth Amendment rights.

#### 12 **A. Ground 1**

13 Abeyta claims that he did not enter his guilty plea knowingly and voluntarily due  
14 to ineffective assistance of counsel (dkt. no. 8 at 4-8). Specifically, he contends his  
15 counsel (a) failed to file a petition for writ of habeas corpus after his preliminary hearing  
16 and (b) failed to file a motion to suppress the testimony of Kelly Mitch. *Id.* To the extent  
17 that federal habeas review of this ground is not foreclosed by *Tollett v. Henderson*, 411  
18 U.S. 258, 267 (1973), it is frivolous and patently meritless, and the Nevada Supreme  
19 Court’s disposition of this claim is not contrary to, or an unreasonable application of,  
20 clearly established federal law.

21 The Nevada Supreme Court affirmed the denial of this claim, stating:

22 [A]ppellant claimed that trial counsel failed to file several motions and a  
23 pretrial petition for a writ of habeas corpus challenging the sufficiency of  
24 the evidence presented at the preliminary hearing. Specifically, appellant  
25 claimed that none of the witnesses testifying at the preliminary hearing  
26 saw a weapon being used to cut the victim’s neck, there was no evidence  
27 of malice aforethought, and no evidence that the victim almost died.  
28 Appellant failed to demonstrate that his trial counsel’s performance was  
deficient or that he was prejudiced. A magistrate’s duty at the preliminary  
hearing is not to determine the guilt or innocence of the defendant but  
rather to determine whether probable cause has been presented that a  
crime was committed and that the defendant committed the crime;  
probable cause may be based on slight or marginal evidence. NRS  
171.206; *Parsons v. State*, 116 Nev. 928, 933, 10 P.3d 836, 839 (2000).

1 Appellant failed to demonstrate that the State did not meet its burden of  
2 establishing probable cause to bind appellant over for trial. Therefore, we  
conclude that the district court did not err in denying this claim.

3 (Exh. 98 at 2-3.)

4 As the Nevada Supreme Court observed, to demonstrate probable cause to  
5 bind a defendant over for trial in Nevada, the State must present only "slight, even  
6 marginal evidence" that crimes were committed and that the defendant committed them.  
7 *Clay v. Eighth Judicial Dist. Ct.*, 305 P.3d 898, 906 (Nev. 2013) (citing *Sheriff v. Hodes*,  
8 606 P.2d 178, 180 (Nev. 1980)).

9 The state-court record reflects the following: Daniel Georgescu testified at the  
10 preliminary hearing that about 8:30 p.m. on September 2, 2008, he drove his car, with  
11 Gilbert Trujillo riding in the front passenger seat, to a Wendy's restaurant in Las Vegas  
12 to pick up a person named Kelly Mitch. (Exh. 4 at 5-8.) Georgescu identified Abeyta as  
13 the person who was there with Mitch when they arrived. (*Id.* at 8-9.) Mitch got in the car,  
14 the doors to the vehicle locked, and then she told Georgescu to drive away. (*Id.* at 9-  
15 10.) Abeyta then reached through the front passenger window, placed his fist against  
16 Trujillo's neck, and pulled it across the neck. (*Id.* at 10.) Trujillo began bleeding. (*Id.*)  
17 Georgescu drove away and took Trujillo to a hospital. (*Id.* at 11-12.)

18 Gilbert Trujillo testified that after Mitch entered the vehicle, he thought Abeyta  
19 struck him in the neck. (*Id.* at 20-23.) As Georgescu drove away, Trujillo saw blood on  
20 his shirt and put his hand on the wound to apply pressure during the drive to the  
21 hospital. (*Id.* at 23-24.) At the hospital, the doctors performed exploratory surgery to  
22 determine whether the laceration had caused any nerve damage, and he received  
23 fourteen staples, which left a four-inch scar on his neck. (*Id.* at 25.) Trujillo testified that  
24 he had had numbness in his neck since the date of the attack. (*Id.* at 26.)

25 Kelly Mitch testified that she was extremely intoxicated at the time of the  
26 incident, but remembered seeing Trujillo and Georgescu arrive to pick her up in the car  
27 and remembered entering the vehicle. (*Id.* at 37-38.) She testified that she had been

28 ///



1 arguing with Abeyta that day. (*Id.* at 41.) She testified that after they drove off, Trujillo  
2 was bleeding. (*Id.* at 42.)

3 Abeyta has failed to demonstrate that the Nevada Supreme Court's decision  
4 was an unreasonable application of *Strickland*. While no witness testified to seeing a  
5 weapon, the testimony that Abeyta ran his fist along Trujillo's throat and caused serious  
6 bleeding and a large laceration certainly provides slight or marginal evidence to prove  
7 Abeyta used a knife or other unknown sharp object and acted with malice.

8 Moreover, while Abeyta alleges that counsel should have moved to suppress  
9 Mitch's testimony, he provides no explanation as to the basis for such a motion or any  
10 further factual allegations related to this claim whatsoever.

11 Abeyta has therefore failed to demonstrate that the Nevada Supreme Court's  
12 decision is contrary to, or involves an unreasonable application of, *Strickland*, or was  
13 based on an unreasonable determination of the facts in light of the evidence presented  
14 in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is denied as to  
15 ground 1.

16 **B. Ground 2**

17 Abeyta asserts that his counsel was ineffective during sentencing because he  
18 never inspected the presentence investigation report for inaccuracies and failed to  
19 object to inaccuracies during sentencing proceedings (dkt. no. 8 at 14-16). The Nevada  
20 Supreme Court affirmed the denial of this claim, stating:

21 [A]ppellant claimed that trial counsel failed to investigate the  
22 presentence investigation report for inaccuracies and challenge those  
23 inaccuracies. Appellant failed to demonstrate that trial counsel's  
24 performance was deficient or that he was prejudiced. Trial counsel  
25 testified that he reviewed the presentence report before sentencing.  
26 Appellant, himself, corrected one of the inaccuracies at the sentencing  
27 hearing, and appellant acknowledged his extensive criminal history at the  
28 sentencing hearing. Trial counsel testified that some of the alleged  
inaccuracies identified were factually correct and that he did not object to  
others as it would emphasize the criminal history. Appellant failed to  
demonstrate that there was a reasonable probability of a different outcome  
had trial counsel done further investigation into the accuracy of the  
presentence investigation report. At the conclusion of the hearing, the  
district court observed that the alleged inaccuracies were actually factually  
correct or that trial counsel made a strategic decision not to challenge the



1           inaccuracies and emphasize the lengthy criminal history. Therefore, we  
2           conclude that the district court did not err in denying this claim.

3           (Exh. 98 at 5-6.)

4           The state-court record reflects that Abeyta's trial counsel testified at the  
5           evidentiary hearing on Abeyta's state postconviction petition. (Exh. 74.) Counsel  
6           testified as follows: he reviewed Abeyta's presentence investigation report (PSI) with  
7           him. Abeyta was concerned that the PSI reflected that he had been charged with  
8           murder because the charge was eventually pled down to second-degree kidnapping.  
9           Counsel did not object because it was not inaccurate. *Id.* at 12. He made a tactical  
10          decision not to object to certain other potential inaccuracies in the PSI so as to de-  
11          emphasize Abeyta's lengthy criminal history. He chose to focus instead on Abeyta's  
12          significant participation in inmate programs while he had been in custody in this case.  
13          (*Id.* at 19-37.)

14          This Court agrees with respondents that because the PSI was accurate, Abeyta  
15          has failed to show that his counsel's failure to lodge objections constituted deficient  
16          performance or that Abeyta was prejudiced. As Abeyta has failed to demonstrate that  
17          the Nevada Supreme Court's decision is contrary to, or involves an unreasonable  
18          application of, *Strickland*, or was based on an unreasonable determination of the facts  
19          in light of the evidence presented in the state court proceeding, ground 2 is denied. 28  
20          U.S.C. § 2254(d).

21               **C.     Ground 3**

22          Abeyta contends his counsel failed to communicate with him for over a year and  
23          failed to attend critical court dates (dkt. no. 8 at 19-22). He alleges that he did not have  
24          an opportunity to discuss any defense strategies.

25          The Nevada Supreme Court affirmed the denial of these claims, stating:

26               [A]ppellant claimed that trial counsel failed to adequately communicate  
27               with appellant. Appellant failed to demonstrate that he was prejudiced as  
28               he failed to demonstrate that further communication with counsel would  
              have had a reasonable probability of altering his decision to enter a guilty  
              plea in the instant case. In exchange for his guilty plea to one count of

1 attempted murder with the use of a deadly weapon, the State agreed not  
2 to pursue habitual criminal adjudication. Therefore, we conclude that the  
district court did not err in denying this claim.

3 [A]ppellant [also] claimed that trial counsel failed to show up to his  
4 preliminary hearing, arraignment, and a hearing on a motion in limine.  
5 Appellant failed to demonstrate that he was prejudiced. The record belies  
6 appellant's claim that his trial counsel was not present for his preliminary  
7 hearing. Appellant failed to demonstrate that there was a reasonable  
probability of a different outcome had his trial counsel appeared at the  
other hearings. Therefore, we conclude that the district court did not err in  
denying this claim.

8 (Exh. 98 at 3-4.)

9 As the state supreme court points out, the record belies Abeyta's claim that his  
10 trial counsel did not represent him at the preliminary hearing. (Exh. 4.) At the evidentiary  
11 hearing on the state postconviction petition, Abeyta's trial counsel testified that he  
12 visited the jail several times to meet with Abeyta, took his and his family members' calls  
13 and met with family members regarding his case. He also testified that he and Abeyta  
14 discussed specific defense strategies and that he was prepared to go to trial the day  
15 that Abeyta accepted a guilty plea agreement. Trial counsel also testified that he  
16 reviewed the guilty plea agreement with Abeyta in detail; his recollection was that they  
17 were in the empty courtroom with the empaneled jury outside. (Exh. 74.)

18 Abeyta has therefore failed to demonstrate that the Nevada Supreme Court's  
19 decision on federal ground 3 is contrary to, or involves an unreasonable application of,  
20 *Strickland*, or was based on an unreasonable determination of the facts in light of the  
21 evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Ground 3 is  
22 denied.

23 **D. Ground 4**

24 Abeyta claims that his counsel failed to object to prejudicial misstatements made  
25 by a victim impact speaker at sentencing (dkt. no. 8 at 26-28). The Nevada Supreme  
26 Court affirmed the denial of this claim, stating:

27 [A]ppellant claimed that trial counsel failed to challenge the victim's  
28 statement at sentencing on the grounds that the State failed to file a  
written notice and the victim made statements alluding to a prior encounter

1 fifteen years earlier. Appellant failed to demonstrate that there was a  
2 reasonable probability of a different outcome at sentencing had trial  
3 counsel objected. In fact, at sentencing, trial counsel indicated that he  
4 anticipated the victim would make a statement and was prepared. Trial  
counsel further objected to the victim's discussion of the fifteen-year-old  
event. Therefore, we conclude that the district court did not err in denying  
this claim.

5 (Exh. 98 at. 6.)

6 The sentencing transcript reflects the Nevada Supreme Court's observations —  
7 that Abeyta's trial counsel informed the court that he had anticipated that the victim  
8 would make a statement and had prepared accordingly. (Exh. 33 at 3.) He also lodged  
9 an objection when the victim spoke about the incident fifteen years earlier, and the state  
10 district court then directed the victim that he could properly comment on how the  
11 incident in this case has impacted his life and his family. (*Id.* at 11-12.) The court had  
12 the record of Abeyta's extensive criminal history before it and specifically noted that its  
13 sentencing determination was influenced by the fact that the then-forty-one-year-old  
14 Abeyta's criminal history dated back to age sixteen and showed a propensity for  
15 violence and violence fueled by alcohol addiction. (*Id.* at 14-15.)

16 This Court concludes that Abeyta has failed to demonstrate that the Nevada  
17 Supreme Court's decision here is contrary to, or involves an unreasonable application  
18 of, *Strickland*, or was based on an unreasonable determination of the facts in light of the  
19 evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas  
20 relief is denied as to ground 4.

#### 21 **E. Ground 5**

22 Abeyta contends that his counsel failed to tell him that a life sentence was not  
23 mandatory (dkt. no. 8 at 31-34). The Nevada Supreme Court affirmed the denial of this  
24 claim, stating:

25 [A]ppellant claimed that trial counsel coerced him into entering a  
26 guilty plea by informing him that he could get a life sentence when a life  
27 sentence was not mandatory in the instant case. Appellant failed to  
28 demonstrate that his trial counsel's performance was deficient or that he  
was prejudiced. During the evidentiary hearing, trial counsel and appellant  
acknowledged difficulties with their relationship. Trial counsel testified that  
the decision to enter a guilty plea was appellant's decision to make and

1 that he conveyed the plea offers made by the State. On the morning of  
2 trial, a plea offer was made, and trial counsel testified that he had an  
3 opportunity to discuss the offer with appellant and discuss any questions.  
4 Appellant, by virtue of his five prior felony convictions, was eligible for  
5 large habitual criminal treatment and a potential sentence of life  
6 imprisonment. NRS 207.010(1)(b). Candid advice about the potential  
7 outcome of trial is not deficient. In entering his plea, appellant  
8 acknowledged that it was freely entered and not the product of threats or  
9 coercion. Therefore, we conclude that the district court did not err in  
10 denying this claim.

11 (Exh. 98 at 5.)

12 As discussed by the Nevada Supreme Court, trial counsel testified at the state  
13 postconviction evidentiary hearing that he and Abeyta “had some ups and downs  
14 throughout the course of my representing him.” (Exh. 74 a 9.) Trial counsel testified that  
15 Abeyta initially wanted to go to trial but that the final decision to enter into the guilty plea  
16 agreement was made by Abeyta. (*Id.*) Abeyta was set to be tried on two counts:  
17 attempted murder with use of a deadly weapon and battery with a deadly weapon  
18 causing substantial bodily harm. (Exh. 4 at 50.) In the guilty plea agreement that Abeyta  
19 ultimately accepted, he pleaded guilty to attempted murder with use of a deadly  
20 weapon. (Exh. 30.) Counsel testified that when they discussed that plea offer he told  
21 Abeyta that, in his opinion, if Abeyta was convicted at trial of both counts on the basis of  
22 having taken a knife and sliced the victim’s throat, the state district court would  
23 sentence him under the large habitual criminal statute (with a potential life sentence).  
24 (Exh. 74 at 32.)

25 Counsel’s candid advice about the potential outcome of trial is not deficient  
26 assistance. Thus, Abeyta has failed to demonstrate that the Nevada Supreme Court’s  
27 decision on federal ground 5 is contrary to, or involves an unreasonable application of,  
28 *Strickland*, or was based on an unreasonable determination of the facts in light of the  
evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Ground 5 is  
denied.

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1           **F.       Ground 7**

2           Abeyta asserts that, despite his requests, counsel failed to investigate, listen to,  
3 or transcribe calls that Abeyta placed from CCDC (dkt. no. 8 at 40-42). Abeyta also  
4 claims that some of the calls would have proven favorable to the defense because they  
5 would have shown that he did not intend to kill the victim. (*Id.* at 40.)

6           The Nevada Supreme Court affirmed the denial of this claim, stating:

7                     [A]ppellant claimed that trial counsel failed to challenge the validity  
8 of the intercepted phone calls made by appellant during his incarceration  
9 at the Clark County Detention Center. Appellant failed to demonstrate that  
10 his trial counsel's performance was deficient or that he was prejudiced.  
Appellant failed to demonstrate that any challenge would have led to the  
phone calls being deemed inadmissible. Therefore, we conclude that the  
district court did not err in denying this claim.

11                     . . .

12                     Conversely, appellant claimed that trial counsel should have  
13 attempted to introduce some of the phone calls to show that he had no  
14 intent to kill the victim. Appellant's protestations of innocence made during  
the phone calls would not have been admissible by themselves to prove  
he did not intend to kill the victim as they were inadmissible hearsay. NRS  
51.035. Therefore, appellant failed to demonstrate that he was prejudiced  
by trial counsel's failure to seek introduction of these statements.

15  
16           (Exh. 98 at 3 and n.3.)

17           The state-court record reflects the following. Numerous telephone calls involving  
18 Abeyta were recorded at the CCDC and provided to the defense in discovery. (Exh. 20  
19 at 7; Exh. 25.) On June 16, 2009, Abeyta's counsel filed a motion in limine seeking to  
20 exclude the phone calls as unduly prejudicial and arguing that they had not been  
21 verified or transcribed. (Exh. 20 at 8.) On September 11, 2009, the State opposed,  
22 arguing that the phone calls were admissible under Nevada law, identifying the witness  
23 who would verify them, explaining that it was in the process of transcribing all of the  
24 calls it intended to use, and offering to transcribe any others that the defense requested.  
25 (Exh. 25 at 3-4.) On September 15, 2009, the court held a hearing and denied the  
26 motion. (See Exh. 7 at 28 (state-court minutes).)

27           About one and one-half months later, on November 2, 2009, Abeyta entered his  
28 guilty plea. (Exh. 31.) The Court agrees with respondents that this procedural history

1 belies Abeyta's claim that his counsel made no efforts to investigate or preclude the  
2 admission of the recorded phone calls. Abeyta thus fails to demonstrate that his  
3 counsel's performance was deficient.

4 With respect to Abeyta's assertion that his counsel should have investigated the  
5 calls further because such investigation would have revealed that there were recorded  
6 phone calls that were favorable to the defense, Abeyta has not identified a single  
7 recorded phone call that would have proven that he was not guilty. Moreover, as the  
8 Nevada Supreme Court explained, even if there were phone calls that could have aided  
9 Abeyta in his defense, they would not have been inadmissible hearsay if offered by the  
10 defense. See NRS 51.035. Accordingly, Abeyta fails to demonstrate that, but for  
11 counsel's actions relating to the recorded calls, he would have chosen to proceed to trial  
12 rather than plead guilty.

13 Abeyta has not shown that the Nevada Supreme Court's decision on federal  
14 ground 7 is contrary to, or involves an unreasonable application of, *Strickland*, or was  
15 based on an unreasonable determination of the facts in light of the evidence presented  
16 in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas relief on ground 7 is  
17 denied.

18 **G. Ground 10**

19 Finally, Abeyta claims that his sentence is cruel and unusual and violates due  
20 process and equal protection in violation of his Sixth, Eighth and Fourteenth  
21 Amendment rights because the trial court sentenced him to a consecutive term for the  
22 weapon enhancement when no weapon was ever introduced into evidence (dkt. no. 8 at  
23 53-55). Abeyta also contends that the state district court was misled by inaccuracies in  
24 the PSI.

25 In affirming his convictions, the Nevada Supreme Court denied this claim, stating:

26 This court will not disturb a district court's sentencing determination  
27 absent an abuse of discretion. *Randell v. State*, 109 Nev. 5, 8, 846 P.2d  
28 278, 280 (1993). Abeyta has not demonstrated that the district court relied  
solely on impalpable or highly suspect evidence or alleged that the  
relevant sentencing statutes are unconstitutional. See *Denson v. State*,

112 Nev. 489, 492-93, 915 P.2d 284, 286-87 (1996); see also *Allred v. State*, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004). Abeyta's sentence of two consecutive prison terms of 60-240 months falls within the parameters provided by the relevant statutes, NRS 200.030; NRS 193.330(1)(a)(1); NRS 193.165(1), and the sentence is not "so unreasonably disproportionate to the offense as to shock the conscience." *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979); *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion). And when the victim referred to a prior bad act committed by Abeyta, defense counsel objected and the district court immediately admonished the victim, instructing him to only discuss how the incident impacted his life. The victim made no further reference to any prior bad act and, considering his extensive criminal history, Abeyta has failed to demonstrate that the district court based its sentencing decision on the victim's unsworn comment. See *Randell*, 109 Nev. at 7-8, 846 P.2d at 280 ("[J]udges spend much of their professional lives separating the wheat from the chaff and have extensive experience in sentencing, along with the legal training necessary to determine an appropriate sentence." (quoting *People v. Mockel*, 276 Cal. Rptr. 559, 563 (Ct. App. 1990))). Therefore, we conclude that the district court did not abuse its discretion at sentencing and the sentence imposed does not constitute cruel and unusual punishment.

(Exh. 53 at 1-2.)

The Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime. *Solem v. Helm*, 463 U.S. 277, 286-287 (1983); *Rummel v. Estelle*, 445 U.S. 263, 271-273 (1980). Successful challenges to non-capital sentences on the basis of disproportionality are "exceedingly rare." *Rummel*, 445 U.S. at 272.

Abeyta was sentenced to two consecutive terms of five to twenty years for attempted murder with use of a deadly weapon. (Exh. 33.) The state district court imposed a lesser sentence than the State sought. (*Id.* at 4.) The court explained that it took Abeyta's twenty-five-year violent criminal history into account. (*Id.* at 14.) Finally, Abeyta does not challenge the constitutionality of the applicable sentencing statute, and the sentence was within the statutory limits. NRS § 193.330(1)(a)(1); NRS § 193.162.

Accordingly, Abeyta has not shown that the Nevada Supreme Court's decision on federal ground 10 is contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court, or was based on an

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unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Ground 10 is denied.

The petition, therefore, is denied in its entirety.

#### IV. CERTIFICATE OF APPEALABILITY

This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this Court to issue or deny a certificate of appealability (COA). Accordingly, the Court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

Having reviewed its determinations and rulings in adjudicating Abeyta's petition, the Court finds that none of those rulings meets the *Slack* standard. The Court therefore declines to issue a certificate of appealability for its resolution of any of Abeyta's claims.

#### V. CONCLUSION

It is therefore ordered that the petition (dkt. no. 8) is denied in its entirety.

It is further ordered that a certificate of appealability is denied.

It is further ordered that the Clerk shall enter judgment accordingly and close this case.

DATED THIS 16<sup>th</sup> day of March 2016.



MIRANDA M. DU  
UNITED STATES DISTRICT COURT